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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-960

RICHARD E. JOHNSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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Petitioner respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of the State of Indiana.

OPINION BELOW

The Desicion of the Indiana Supreme Court is reported at 355 N.E. 23. 240.

JURISDICTION OF THE COURT

The Petition for Writ of Certiorari is being filed within ninety days of the Decision of October 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254.

QUESTION PRESENTED

Whether the Indiana Supreme Court erred in sustaining the conviction of Richard Johnson.

STATEMENT OF THE CASE

Richard Johnson, the petitioner herein, was indicted on June 26, 1974 in the Marion County Criminal Court in the State of Indiana for the crime of first degree murder. He had been arrested the same day. On July, 1974 he pleaded not guilty, and on July 2, 1974, bail was denied. After defendant moved for a change of venue, the case was transferred to the Johnson County Circuit Court on August 15, 1974. Trial by jury was set for October 21, 1974 and continued until November 11, 1974. The jury on the 20th day of November, 1974 informed the Court that they were unable to reach a verdict.

The case was reset for jury trial on the 10th day of February, 1975, and upon defendant's motion for a speedy trial, the case was reset, first for January 20, 1975, and later for February 3, 1975. On January 29, 1975 original trial counsel withdrew, and court-appointed counsel was appointed by the court that same day. On January 31, 1975, court-appointed counsel entered their appearance.

On February 3, 1975 defendant, Johnson, filed his Motion for a Change of Venue from

the County and a Motion for Discharge under Criminal Rule 4. The Motion for Change of Venue and Motion for Discharge were denied on February 3, 1975, and the case was continued until February 19, 1975. Robert Gurley, co-defendant of Richard Johnson, had been convicted at the end of January, 1975.

The trial commenced on February 19, 1975 and concluded on March 9, 1975 with a jury verdict of guilty of murder in the first degree returned against defendant, Richard Johnson. Defense counsel had tendered proposed Jury Instructions No. 8 and No. 9 relating to the lesser included offenses of voluntary and involuntary manslaughter, but the trial judge had refused those instructions. On March 11, 1975 defendant was given a life sentence.

On May 9, 1975 defendant's Motion to Correct Errors was filed. On June 13, 1975 defendant's Motion to Correct Errors was overfuled. Defendant's appeal to the State Supreme Court was timely filed, and on October 12, 1976 the Supreme Court of the State of Indiana affirmed the conviction of Richard Johnson.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant certiorari in Johnson v. State, 355 N.E. 2d. 240 in order to correct a manifest injustice resulting from the denial of defendant's right of due process and equal protection of the law and the right to a fair trial. The most blatant denial of due process emanated from the failure of the trial judge to instruct the jury that it could convict the defendant of a lesser included offense of voluntary or involuntary manslaughter. Presumeably, the judge rejected these jury

charges because the statute of limitations had run out on the lesser included offenses. However, the defendant waived any objection to a conviction of a lesser included offense when he voluntarily requested Jury Instructions No. 8 and 9.

With the rejection of the charges on a lesser included offense, petitioner found himself in the anomalous position of having fewer options than other accused felons. If the police had done their detective work more expeditiously and defendant had been indicted with dispatch, he would have had the benefit of a jury that could have convicted him of a lesser offense than that of first degree murder. That defendant, Richard Johnson, should be in a less favorable position than other defendants, solely as a result of the age of the case, creates an irrational classification scheme that violates both the due process and equal protection clauses of the 14th Amendment.

The failure to provide defendant his full panoply of constitutional rights is highlighted by other improprieties in the trial. This was a celebrated case in Johnson County with the attendant controversial media coverage in conjunction with the recent conviction of the co-defendant in the same Court which may have resulted in undue prejudice. Furthermore, the inadequate time available for substitute court-appointed counsel to prepare for a first degree murder trial, less than twenty (20) days, made it impossible for defendant to receive adequate representation.

Denial of Instructions of Lesser Included Offenses.

Indiana has statutory authority for the proposition that a jury may impose a verdict

on a lesser included offense. I.C. 1-39-1 provides:

> "Verdict-different degrees, upon an indictment or affidavit for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or affidavit, and guilty of any degree inferior thereto, or of an attempt to commit the offense."

I.C. 1971 35-1-39-2 defines a lesser included offense as follows:

> "One offense included in another. In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily in that which he is charged in the indictment or affidavit."

Defendant tendered the following Jury Instructions No. 8 and No. 9, reading as follows:

> "No. 8. You are instructed that in addition to finding the defendant, Richard Johnson, guilty of the verdict of first degree murder or of not guilty under the indictment, you may find that the defendant is guilty of the charge of second degree murder, the charge of voluntary manslaughter and the charge of involuntary manslaughter."

> "No. 9. If, under the law and the evidence you should find the defendant, Richard Johnson, guilty, then you must determine the degree of guilt and fix the penalty therefore. If you find him guilty and have a

> reasonable doubt as to whether he is guilty in the Indictment of murder in the first degree or murder in the second degree, then you should find him guilty of murder in the second degree. If you find him guilty and have a reasonable doubt as to whether he is guilty of murder in the second degree or voluntary manslaughter, then you should find him guilty of voluntary manslaughter."

> "If you find him guilty and have a reasonable doubt as to whether he is guilty of voluntary manslaughter or involuntary manslaughter, then you should find him guilty of involuntary manslaughter."

The courts of the State of Indiana have consistently followed the statutes regarding lesser included offenses. See Dukes v. State (1858) 11 Ind. 557 through King v. State (1959) 240 Ind. 16, 158 N.E. 2d. 791. For example, in Freeman v. State (1967) 231 N.E. 2d. 246, the refusal to give an instruction on the lesser included offense of entering to commit a felony, was held to be reversible error.

The Fourteenth Amendment, Section 1, of the Constitution of the United States provides:

> "Citizenship--Due Process of Law--Equal Protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive

any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of law."

While there may be authority for limiting the charge to offenses which are properly within the statute of limitations, that consideration is no longer operative when waived by defendant. Defendant wanted the jury to consider lesser included offenses and voluntarily waived any right of immunity under the statute of limitations by choice. That decision was a calculated gamble, exposing defendant to a verdict on offenses that would be barred by the statute of limitations in exchange for informing the jury that it could bring in a verdict on a lesser included offense. When the trial judge denied defense Instructions No. 8 and No. 9, the jury could either convict on first degree murder or acquit. The court arbitrarily and in violation of equal protection of the law denied defendant basic Constitutional rights available to all other citizens accused of criminal activity.

That defendant, Richard Johnson, be singled out for the discriminatory treatment solely because of the delay between the alleged felonious act, the contract killing of Donald Stout on January 20, 1968, and the June 26, 1974 indictment, penalizes petitioner for events beyond his control--the difficulty of the police in focusing upon a suspect. If he had been arrested and indicted the day after the alleged murder, he would have been entitled to instructions on lesser included offenses, while the passage of the statutory time on the lesser included offenses in this case restricted his options and subjected him to a life sentence for first degree murder without the jury being

able to consider lesser offenses as requested by the defendant.

Furthermore, the intensity of the law enforcement officials desire to secure a conviction in this case is exemplified by the immunity offered to the informant, Henry R. Cobb, whose improbable testimony that he and co-defendant, Robert Gurley, performed a contract murder without any front money upon the representation that they would be paid from the proceeds of an insurance policy owned by Wanda Stout, the decedent's wife.

Finally, a newspaper article appearing in the August, 1975, issue of Front Page Detective entitled "Old Homicides Don't Fade Away" is an unabashed eulogy of the detective work involved in solving the homicide and may explain, in part, the State's eagerness to retry the case after the hung jury of November 20, 1974.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be granted to review the Decision of the Indiana Supreme Court in the case of Johnson v. State 355 N.E. 2d. 240.

Respectfully submitted,

M. Daniel Freidland

M. Daniel Freidland
Attorney for Petitioner

APPENDIX

Richard E. JOHNSON, Appellant,

v.

STATE of Indiana, Appellee.

No. 9758220.

Supreme Court of Indiana.

Oct. 12, 1976

Defendant was convicted in Circuit Court, Johnson County, Robert W. Young, J., of first degree murder, and he appealed. The Supreme Court, Arterburn, J., held, inter alia, that the trial court properly denied a motion for a second change of venue, that defendant was not denied a speedy trial, and that the trial court properly refused to give a tendered instruction on lesser included offenses.

Affirmed.

DeBruler, J., concurred in result.

ARTERBURN, Justice.

The Appellant, Richard E. Hohnson, was indicted in Marion County on June 26, 1974, for the first degree murder of one Donald Stout. The evidence at trial showed that the Appellant hired Rpbert Gurley and Henry R. Cobb on or about January 20, 1968, to kill the decedent. Cobb testified, in exchange for immunity from prosecution, that the Appellant paid him and Gurley out of proceeds from a life insurance policy

owned by Wanda Stout, the decedent's wife and the Appellant's girlfriend. By motion of the Appellant, the case was venued to Johnson County on August 15, 1974. The first trial of this cause commenced on November 11, 1974. On November 20, 1974, the jury informed the trial court that it was unable to reach a verdict. The Appellant was tried a second time beginning February 19, 1975. The jury in this second trial found the Appellant guilty as charged on March 4, 1975. Sentenced to life imprisonment on March 11, 1975, the Appellant filed his motion to correct errors on May 9, 1975.

I.

[1,2] The Appellant's first contention is that the prosecution, in cross-examining certain defense witnesses, prejudiced the Appellant by inquiring into the witnesses' relationships with men or women with whom they had been seen or living. The Appellant concedes, however, that no objection to this questioning was made at trial. Error not raised by proper objection at trial will not be considered on appeal unless the failure to consider the alleged error would deny the Appellant "fundamental due process." Brown v. State, (1975) Ind., 338 N.E.2d 498. There is no such denial of due process here. This alleged error has not been preserved for our review.

II.

[3] On February 3, 1975, the Appellant filed a motion for change of venue from Johnson County. The motion alleged prejudice from newspaper articles which had appeared in the Indianapolis Star, the Indianapolis News, and a Franklin newspaper, the Daily Journal. The trial judge denied this motion, with the reservation that if, during

voir dire of prospective jurors, "there is in the Court's mind any - just any scintilla of reason why this man cannot get a fair trial in this County" he would reverse himself. The Appellant urges reversible error in this denial.

We can find no error by the trial court here. Criminal Rule 12 explicitly provides that "the defendant shall be entitled to only one [1] change from the county." The Appellant had already obtained a change of venuefrom Marion County. Thereafter, all changes are within the discretionof the trial court and must be predicated on a showing of good cause. Burton v. State, (1973) 260 Ind. 94, 292 N.E.2d 790.

The Appellant has failed to present any evidence whatsoever to show that his jury was prejudiced. The newspaper articles in question were not presented to the trial court and are not in the record. No portion of the voir dire examination of the jurors in this case is presented to show that they read or were influenced by those articles. The Appellant has compiled no record of damaging publicity, but merely asserts that it existed. We find nothing to support the conclusion that the trial court abused its discretion. See Buchanan v. State, (1975) Ind., 332 N.E.2d 213.

III.

[4] On September 3, 1974, prior to his first trial, the Appellant moved for an early trial pursuant to Criminal Rule 4(B). The Appellant's fist trial began on November 11, 1974, within the seventy day period prescribed under that rule. The jury was unable to reach a verdict and was discharged on November 20. On December 19, 1974, another motion for early trial was filed by the Appellant. The Appellant's second trial began on

February 19, 1975, within the seventy day period extending from the date of the second motion.

On February 3, 1975, the Appellant filed a motion for early trial. The Appellant urges error in the trial court's denial of this motion, contending that the seventy day period automatically began running again on November 20. This incorrectly interprets the operation of Criminal Rule 4(B) in a situation such as here. The early trial rule of Criminal Rule 4(B) is not self-executing. Gross v. State, (1972) 258 Ind. 46, 278 N.E.2d 583. "When a motion has been made under CR. 4(B), and the trial court has acted on that motion by setting a trial date, the motion will be deemed to have served its purpose." Cody v. State, (1972) 259 Ind. 570 at 575, 290 N.E.2d 38 at 41. When the Appellant's first trial ended in a mistrial, he was required to make another motion to bring the provisions of Criminal Rule 4(B) into operation. This he did by his motion of December 19. The seventy day period thus began running from the date of this second motion.

We do not think that this requirement that a defendant renew his motion for early trial after a mistrial saddles him with any great burden. Indeed, we do not think that it can be presumed that a defendant in such a situation will want to invoke the rule's provisions. It is easy to conceive of cases in which defendants, after a trial ends with a hung jury, would want more than seventy days to revise trial strategy or conduct further investigation. In this case, the Appellant changed attorneys on the seventieth day from the date of his mistrial. The publicity which arises in any trial also argues against retrial in the same court in too short a period of time. It is thus simply up to a defendant to weigh these factors before deciding whether to once more seek an early trial.

The seventy day period relevant to the Appellant's motion for discharge did not begin running until the date of his second motion for early trial. As already noted, the trial of this case commenced within that time period. The trial court thus did not err in denying the Appellant's motion for discharge.

IV.

[5] The Appellant next urges error in the refusal of the trial court to give Defendant's Instructions No. 8 and No. 9, which dealt with lesser included offenses of first degree murder, voluntary and involuntary manslaughter. It is argued by the Appellee that this issue has been waived by the failure of the Appellant to object at trial to the rejections of these tendered instructions. This was not necessary. Criminal Rule 8(B) does not require that objections be made to the refusal of tendered instructions. "The instruction speaks for itself, and if under the law and facts involved it should have been given, the record at this stage preserves the error." Gilmore v. State, (1951) 229 Ind. 359 at 367, 98 N.E.2d 677 at 681.

[6] This Court confronted this same question in the appeal of the Appellant's confederate, Robert Gurley. The relevant facts there were, of course, identical to those here. Our conclusion in that case is dispositive of this question:

> "The jury was not instructed that it could find the defendant guilty of the lesser included offense of manslaughter, notwithstanding three tendered instructions in this regard. They were refused by the court, because

> the statute of limitations precluded a prosectution for manslaughter. Ind. Code § 35-1-3-4 (Burns, 1975).
>
> We find no Indiana case discussing the propriety of instructing a jury upon a lesser included offense for which the statute of limitations had run. The weight of authority from other jurisdictions is that if the defendant could not be convicted of the lesser included offense, the instructions upon such offense are properly refused. Chaifetz v. United States, (1960) 109 U.S. App. D.C. 349, 288 F.2d 133, reversed on other grounds, (1961) 366 U.S. 209, 81 S.Ct. 1051, 6 L. Ed2d 233; People v. Lohnes, (1973) 76 Misc.2d 507, 351 N.Y.S.2d 279; Annotation 47 A.L.R.2d 887 (1956)."

Gurley v. State, (1976) Ind., 348 N.E.2d 16 at 20-21.

V.

[7] The Appellant's final allegation of error is that his trial counsel, who were appointed on January 29, 1975, did not have adequate time to prepare their case. When the Appellant effected this change of attorneys, trial was scheduled for February 3. This was subsequently continued until February 19. At no time did the Appellant's trial counsel seek further delay. At no time did they object to the ultimate trial date. The Appellant concedes that his trial counsel were "highly competent" and does "not charge counsel for lack of a zealous and active defense." Essentially, we are asked to presume that he was afforded an inadequate defense solely

on the basis of the time factor he raises. This we cannot do. Cf. Cade v. State, (1976) Ind., 348 N.E.2d 394.

The judgment of the trial court is affirmed.

GIVAN, C. J., and HUNTER and PRENTICE, JJ., concur.

DeBRULER, J., concurs in result.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari has been served upon the office of the Attorney General of the State of Indiana, 219 State House, Indianapolis, Indiana 46204 by U.S. Mail, first class postage prepaid, this 10th day of January, 1977.

M. Daniel Friedland
Attorney for Petitioner

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner's statement of the case herein is relatively accurate, but respondent would modify that statement as follows:

Petitioner prays for a writ of certiorari herein on the singular reason that petitioner was denied due process of law and equal protection under the 14th Amendment of the Constitution of the United States by the trial court refusing to instruct the jury that a verdict for a lesser included offense could be returned, when in fact lesser included offenses were barred by the statute of limi-

tations of Indiana. Pursuant to Rule 19, petitioner is not entitled to a writ of certiorari, within the discretionary powers of this court because there is no special or important reason therefor and petitioner has not shown that the Supreme Court of Indiana, in affirming petitioner's conviction in the trial court, decided the case herein in a way not in accord with applicable decisions of this court.

ARGUMENT OF RESPONDENT

I. The Indiana Supreme Court determined petitioner (Defendant below) could not be convicted of a lesser included offense within First Degree Murder when such lesser include offenses were barred by the statute of limitations of Indiana and cited *Chaifetz v. U.S.* (1960) C.A., D.C. 288 F.2d 133. This rule is well supported by authorities collected in 47 A.L.R. 2d 888 (1956). Petitioner argues he waived the bar of the statute of limitations by presenting the instructions to the trial court advising the jury they could convict petitioner for a lesser included offense. Petitioner cites no authority in support of this assertion.

II. Petitioner complains of the police and law enforcement authorities failing to "work more expeditiously" and "with dispatch" so that he could have "benefit of a jury that could have convicted him of a lesser offense" and this placed him "in a less favorable position then other defendants solely as a result of the age of the case" and this violated his due process and equal protection rights. Petitioner further states this penalizes him "for events beyond his control". However petitioner does not explain that he left the jurisdiction of Indiana Courts and that it was never beyond his control or ability to surrender himself to authorities so that he could have the protection of conviction of an offense lesser than First Degree Murder. Petitioner's pseudo-logic, without any supporting legal authorities should not be persuasive.

An Indiana statute (IC 35-1-3-5) permits the suspension of the statute of limitations for the period of time a person who has committed an offense is absent from the state of Indiana or conceals himself so that process can-

not be served on him, but petitioner did not attempt to invoke this statute. However, to have done so would have required an amendment of the indictment. *Ulmer v. State* (1859) 14 Ind. 120.

III. Petitioner's reasons in support of his petition are contradictory. After asserting lack of dispatch and failure to focus upon him as a suspect, he refers to "the intensity of law enforcement officials desire to secure a conviction" with an informant as a witness. Also, there is reference to an article from a publication six months after petitioner's trial, said by petitioner to be "an unabashed eulogy of the detective work done in solving the homicide.

The latter, reasons petitioner "may explain, in part, the State's eagerness to retry the case after a hung jury of November 20, 1974. The more important *part,* and legally so, was petitioner's motion to the trial court for a speedy trial under the Indiana rule requiring same within a seventy day limit.

IV. The alleged denial of rights urged by petitioner arises from Indiana statutes and petitioner has failed to show how he is not within the classification of persons affected thereby and thus excluded from the equal protection of these laws. Further, petitioner presents no authority that such rights allegedly denied him are federal constitutional rights.

CONCLUSION

WHEREFORE, the Respondent respectfully moves the Court to deny this petition for a writ of certiorari and affirm the decision entered in this cause, *Johnson v. State of Indiana,* 355 N.E.2d 240, by the Indiana Supreme Court; and for all other proper relief in the premises.

Respectively submitted,

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